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THE NEXT STEP IN THE EVOLUTION OF THE CASE-BOOK.[1]

THIS article assumes that the comparative merits of the case-book and the text-book methods of teaching law are no longer an issue in legal education. It assumes, also, that the case-books, as represented by those in use at the Harvard Law School, have driven the text-book pretty much out of existence as a means of instruction. Are these case-books, however, and those constructed on similar lines, the last word? Do they represent perfection for all time to come? Probably not. What, then, is to be the next radical step in their evolution? It is the purpose of this article to maintain that in the older and more important jurisdictions of the United States there is a legitimate and increasing demand for instruction in first-class law schools by case-books arranged, so far as topics treated are concerned, upon the lines of the present Harvard Law School case-books, but composed as far as practicable of cases from the particular jurisdiction, with the end to present an accurate exposition of the law in force at the present day in that jurisdiction. Such a demand will, it is believed, dictate the next radical step in the evolution of the case-book itself.

The securing of the approval of those who already agree with me would hardly justify the present effort. It is, therefore, my object to reach those who bristle with opposition at the very suggestion of the step proposed. Let me ask them, however, to put aside for the moment their opposition upon the ultimate matter for argument, and to consider briefly those preliminary matters about which we can all heartily agree.

We can agree in the first place, I think, that whatever excellence the Harvard Law School case-book may have, and whatever high function it may fulfil, it does not present a perfect and detailed

[1] The fact that the writer occupies a position as teacher in a law school which uses, perhaps as extensively as any, excepting Harvard itself, the Harvard Law School case-books, makes it necessary to say at the outset, with some emphasis, that the above article is written entirely in his private capacity. The views expressed in it must not be taken as representing those of any other member of the faculty of which he is a member, much less as being the foundation of any action by the school in the scope and subject-matter of its teaching.

picture of the present state of the law in any particular one of the older and more important jurisdictions of the United States. It is apparent that English law, so far as it is unaffected by the more modern statutes, is the only single system that is minutely examined in the cases of the particular jurisdiction where it is or was in force. No doubt only that part of the English law is taught which has in general been transplanted to America. Perhaps here and there a new subject is added which is not to be found at all in the English cases. It is obvious, also, that the Harvard Law School case-book contains American cases which tend to show modifications or departures from the rules of the English law in some jurisdictions in this country. Sometimes, perhaps, the American cases go a little farther and tend to show the adoption in a particular state of the rules of the English law. When all is said, however, it appears to be true that the Harvard Law School case-book does not, and does not purport to give an accurate and detailed picture of the law of any single American jurisdiction.

We can also all agree, I am sure, that the proper aim of the law school is to turn out lawyers well equipped for practice, or who will become so upon a comparatively brief apprenticeship. This is emphasized very neatly in a few words by Sir Frederick Pollock in a recent number of the *Law Quarterly Review* at the end of some appreciative remarks concerning the work of the late Professor Langdell.[1] He says:

> "It is perhaps necessary to say here, though in America it is now superfluous, that the Harvard Law School under Professor Langdell's system has produced not mere theoretical students, but lawyers well equipped for practice. . . . Meanwhile the majority of the English bar, or at any rate of those in authority, continue, it seems, to believe that law cannot be taught at all. The Law Society thinks otherwise."

Obviously Sir Frederick Pollock justifies the teaching of law by law schools by repelling any insinuation that the law school gives its students merely a liberal education, or that it makes them historical scholars or mere theoretical lawyers. He justifies the teaching of law by law schools because they can produce, to use his own phrase, "lawyers well equipped for practice," or, to modify this very slightly, "lawyers who will become so upon a comparatively brief apprenticeship." This certainly does not mean, in the mouth of a member of the English bar, that they can produce merely

[1] 22 L. Quar. Rev. 335.

better and more efficient office clerks, or even attorneys and solicitors who become client caretakers, or professional trustees, or even the directors of great industrial enterprises and policies, but who never enter a court room on a contested matter. It means that the law school can and does equip the men who will become competent to handle the most difficult litigated problems of law and fact, whose work will be before the trial and appellate courts, and in whose hands the shaping of the law will lie, and whose ultimate destination may be leadership at the bar or an honorable place upon the bench.

We can also agree, I think, that the lawyer to be well equipped for practice at the bar in this exalted sense must know the actual rules of law in force where he practices. It is not enough that he knows where to find them. Practice could hardly be profitable or successful if one went upon the principle that no rule need be definitely known till the occasion for using it arises. It is not even enough that what the rule probably is may be known. The well-equipped lawyer is one who knows, in a field of considerable extent at least, the exact situation in a given jurisdiction. He may also know whether it is right or wrong, or how it compares with the rule in force in other jurisdictions, but, first of all, he *knows* what the rule is. He necessarily knows what the rules are in the terms of the decisions of the particular jurisdiction. He may indeed distinguish between good exposition and bad, but, at any rate, he knows the terms in which the fixed results are expressed.

A reasonable amount of agreement upon these preliminary matters will make the issue between us quite plain and precise. Those who are well satisfied with the present Harvard Law School case-books will no doubt concede that to cause one who has mastered their contents to be well equipped for actual practice at the bar of one of the older and more important jurisdictions, much toil and effort over the local law is necessary. On the other hand, I must in fairness admit that this line of effort is to some extent inevitable, and that a law school cannot expect to turn out graduates at once well equipped for practice at the bar in such jurisdictions. The real question between us is this: Does the present case-book go far enough in equipping its graduates for actual practice at the bar in the older and more important jurisdictions? The answer to this question depends entirely upon how long it takes in such jurisdictions to bridge the gap between that knowledge which is the reward for having mastered the case-books, and that which is necessary to

a good working knowledge of the substantive law in the particular jurisdiction. If it takes only a short time, then no doubt the case-book is doing all that can be expected of it. If it takes a long time, if in fact the work is so laborious that it cannot be done under ordinary circumstances within a reasonable time, and consequently is not being done at all, then the case-book is certainly open to objection.

The charge against the present Harvard Law School case-book is that in the older and more important jurisdictions the work of checking up its results with the local law has become an impossibility. It does not merely take time. It can't be done. Life is too short. I venture to assert that to obtain a good working knowledge of the law in such jurisdictions on topics studied in the Harvard Law School case-book, it is necessary carefully to note the actual departures by statute and by decision from the law as taught by the case-book, to supply new topics closely related to the subject-matter of the case-book, to learn the well-settled rules taught by the case-book, or the solution of controverted questions, in terms of the cases of the particular jurisdiction. I do not hesitate to affirm that these steps involve so much labor that the individual student who has mastered the subject-matter of the case-books can no longer do it for the courses or even the majority of those which he studies during three years in a law school.

This is too serious a charge to be made without something in the way of proof.

Suppose, then, we resort to experiment to determine how long it will take a student of the Harvard Law School case-books to master the law in one of our older and more important jurisdictions on the subjects covered by those case-books. Suppose, for instance, we attempt to estimate what the student of the fifth and part of the sixth volumes of Gray's Cases on Property, concerning conditional and future interests and illegal conditions and restraints, must do to gain exact knowledge of the status of the Illinois law on the subjects studied, and how long it will take him.

I am aware, of course, that the details of the Illinois law, as such, are of no interest whatever here, but what you would not consider for itself may well arrest your attention because of the general condition which it typifies.

It cannot be made too clear at the outset that our student has no exact knowledge of the rules in Illinois on the topics he has

studied in Gray's Cases. That does not mean that most of the propositions learned from Gray's Cases are not law in Illinois. It does mean that the departures from those propositions and the new topics are such that until the whole field is covered and all the Illinois cases classified and arranged so as to reveal the departures, the new topics, the exact propositions incorporated into the Illinois law by actual decisions, and those left still undecided, no exact or professionally valuable knowledge of the state of the law in Illinois can be had.

The student of Gray's Cases will think that a right of entry for condition broken is inalienable by deed and very likely also inalienable by devise. Yet he can be shown Illinois cases where alienation in both ways has been sustained.[1] The student will know that legal contingent remainders and executory interests are inalienable by deed at law. Nevertheless, he can be shown a recent Illinois case which holds that such interests are alienable at law within certain peculiar limits.[2] The student no doubt thinks that in the absence of statute a legal contingent remainder is destructible in Illinois, and yet he can be shown a case where a life estate preceding a contingent remainder was determined by merger in the reversion prior to the birth of the child to whom the contingent remainder was limited, and where, nevertheless, the remainder was held not to be destroyed.[3] No doubt the student has preconceived ideas concerning what remainders are vested and what are contingent. If so, upon the production of a few recent Illinois cases he will readily perceive that there are at least four different distinctions between vested and contingent interests in daily use.[4] In short, he will find in the Illinois cases that his notions of what interests are vested and what not are in a very puzzling state of decay. The student has learned that upon the dissolution of a charitable corporation without debts, the title to land held by it will escheat to the state.[5] But the Illinois cases hold that there is a right of reverter to the donor or his heirs.[6] In accordance with one of the cases reprinted by Mr. Gray,[7] the student doubtless

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1 Helm *v.* Webster, 85 Ill. 116; Gray *v.* Chicago, etc., R. R., 189 Ill. 400.

2 Boatman *v.* Boatman, 198 Ill. 414.

3 Frazer *v.* Board of Supervisors, 74 Ill. 282.

4 See Vested and Contingent Future Interests in Illinois, 2 Ill. L. Rev. (Dec. 1907).

5 Gray, Rule Perp., 2 ed., §§ 44–51; Johnson *v.* Norway, Winch 37.

6 Life Ass'n of Am. *v.* Fassett, 102 Ill. 315, 323, *semble;* Mott *v.* Danville Seminary, 129 Ill. 403; Presbyterian Church *v.* Venable, 159 Ill. 215.

7 Papillon *v.* Voice, 2 P. Wms. 471, 5 Gray, Cas. on Prop., 95.

thinks that the Rule in Shelley's Case does not apply where, after an equitable life estate to A, there is a direction to trustees to convey to A's heirs. Yet an Illinois case holds that to such limitations the Rule does apply.[1] No doubt there is to the student no proposition more fundamental or more certain than that shifting interests in deeds which may take effect as bargains and sales under the Statute of Uses are valid. Yet the Illinois Supreme Court has frequently denied this, declaring a shifting interest, or, as it is often termed, "a fee on a fee," void when attempted to be created by deed.[2] In one case at least the court squarely so held.[3] In the same way the student will regard a conveyance by deed capable of taking effect by way of bargain and sale to A and his children born and to be born, as valid to carry the fee to all the members of the class born at the time of the conveyance or afterwards. Nevertheless, in Illinois the inference from the cases is that the conveyance is valid only as to those who are *in esse* at the time the deed is executed.[4] Perhaps the student would be amused if he were asked seriously whether a shifting executory devise were valid. Yet there was a time not very long ago when two cases in the Illinois reports[5] holding that an unobjectionable shifting interest by will was void, on grounds which would make all executory devises invalid, stood unimpeached. The student will no doubt think that upon the failure of a gift over for remoteness the preceding gift stands as limited. But several striking cases in Illinois appear to make the rule rather that the preceding gifts which are not too remote will also fail.[6] A gift over if the first taker "die without issue," the student will have learned means die without issue either before or after the death of the testator or settlor. Yet an Illinois case can be produced where without any special context it meant die without issue in the lifetime of the testator only.[7] So he has learned that "die without issue" means primarily, in the absence of statute, an indefinite failure of issue.

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[1] Wicker *v.* Ray, 118 Ill 472.

[2] Siegwald *v.* Siegwald, 37 Ill. 430, 438; Glover *v.* Condell, 163 Ill. 566, 592; Strain *v.* Sweeney, 163 Ill. 603, 605; Stewart *v.* Stewart, 186 Ill. 60; Kron *v.* Kron, 195 Ill. 181; Johnson *v.* Buck, 220 Ill. 226, 1 Ill. L. Rev. 188.

[3] Palmer *v.* Cook, 159 Ill. 300.

[4] Miller *v.* McAlister, 197 Ill. 72; Morris *v.* Caudle, 178 Ill. 9.

[5] Ewing *v.* Barnes, 156 Ill. 61, 67; Silva *v.* Hopkinson, 158 Ill. 386, 389.

[6] Lawrence *v.* Smith, 163 Ill. 149; Eldred *v.* Meek, 183 Ill. 26; Petzel *v.* Schneider, 216 Ill. 87.

[7] Kohtz *v.* Eldred, 208 Ill. 60.

Yet an examination of the Illinois cases will tend to persuade him that without the aid of statute the regular rule has been so changed that the phrase means primarily a definite failure of issue in the first generation.[1] He will have learned that a gift over of real estate on an indefinite failure of issue turns the preceding interest of the first taker into an estate tail. Yet an examination of the Illinois cases and a consideration of the indirect effect of the Illinois Statute on Entails will cause him to doubt the soundness of this result in Illinois.[2] The Illinois case of Carper *v.* Crowl[3] will make our student wonder whether the Rule of Yates *v.* Phettiplace,[4] that a legacy to A to be paid at twenty-one charged on real estate is contingent upon A's reaching twenty-one, is the law of Illinois. Our student will find the Rule in Wild's Case[5] and the doctrine of illusory appointments abolished without the direct aid of statute.[6] He will find an Illinois case,[7] apparently departing from the Rule of Holloway *v.* Holloway,[8] that upon a devise to A for life and then to the testator's heirs, of whom A is one, heirs means those who are heirs of the testator at the time of his death, including A. The student will have learned that the doctrine of the common law and everywhere upheld, that a condition of forfeiture on alienation attached to a life estate upon its creation, is valid, but that a restraint on alienation attached to a legal life estate is everywhere wholly void. Nevertheless, in Illinois both these results seem to have been reversed. The condition of forfeiture attached to a life estate is void,[9] while the restraint on alienation of a legal life estate is valid.[10] Our student has no doubt learned that bad as is the spendthrift trust doctrine, it can nowhere be invoked unless the settlor expressly imposes the re-

[1] Summers *v.* Smith, 127 Ill. 645, 650–651; Smith *v.* Kimbell, 153 Ill. 368, 376; Healy *v.* Eastlake, 152 Ill. 424; Kellett *v.* Shepard, 139 Ill. 433; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58; Strain *v.* Sweeney, 163 Ill. 603; Gannon *v.* Peterson, 193 Ill. 372.

[2] Strain *v.* Sweeney, 163 Ill. 603; Healy *v.* Eastlake, 152 Ill. 424; Seymour *v.* Bowles, 172 Ill. 521; Johnson *v.* Askey, 190 Ill. 58.

[3] 149 Ill. 465, 482–485.

[4] 2 Vern. 416, 5 Gray, Cas. on Prop., 263.

[5] 6 Co. 17.

[6] Davis *v.* Ripley, 194 Ill. 399; Boehm *v.* Baldwin, 221 Ill. 59; Hawthorn *v.* Ulrich, 207 Ill. 430.

[7] Thomas *v.* Miller, 161 Ill. 60, 72.

[8] 5 Ves. 399, 5 Gray, Cas. on Prop., 318.

[9] Henderson *v.* Harness, 176 Ill. 302.

[10] Christy *v.* Pulliam, 17 Ill. 59; Pulliam *v.* Christy, 19 Ill. 331; Christy *v.* Ogle, 33 Ill. 295; Emerson *v.* Marks, 24 Ill. App. 642.

straint on alienation desired. Nevertheless, he must learn that in Illinois a practical restraint on involuntary alienation for the benefit of creditors exists in favor of a *cestui* who does not settle property upon himself, even where no express language provides for any such protection.[1]

The retort to this recital is very obvious. It is easy to make fun of the Illinois Supreme Court, and to declare that if anything needs reforming, it evidently does. But this vein of humor is futile. It is grim comfort to your graduate who has passed upon a title, made a fatal mistake, and is put down as incompetent. Your humor will fall flat, and your teachings will receive less credit than they deserve when your graduate finds that commercially and professionally his knowledge is still far from what it must be. While you are indulging a mild propensity for humor, somebody is condemning your school for the very inaccurate and incomplete picture of the law which it has given.

There are not merely departures in the Illinois law to be learned by the Harvard Law School case-book graduate. Important new topics directly connected with the fabric of the whole subject-matter exist to be mastered. Mention of these will also tend to convince the student that his knowledge of the Illinois law is *in posse* rather than *in esse*. The rights of the dedicator and the abutting owner when there has been a statutory dedication is an exceedingly important subject. Legislation and the cases have made it extremely difficult to handle.[2] A knowledge of statutory conditions of forfeiture and the statutory modes of perfecting a forfeiture of terms for years is an indispensable part of the law of landlord and tenant in daily use, and fully dealt with in the decided cases.[3] A whole chapter on the statutory remainder created by the Statute on Entails must be mastered.[4] Most puzzling questions arise in regard to it, all of which are dealt with in some fashion in the Illinois cases and the cases from four other states having the same statute. The application of the inheritance tax law to future interests is of extreme practical importance.[5]

If the student has by this time come to recognize the professional difference between knowing what the Illinois Supreme Court has

[1] Potter *v.* Couch, 141 U. S. 296; Binns *v.* La Forge, 191 Ill. 598. See 1 Ill. L. Rev. 321–322.

[2] Kales, Future Interests in Illinois, §§ 2–13.

[3] Kales, *ibid.*, §§ 21–26, and 30*a*–40*a*.

[4] Kales, *ibid.*, §§ 114–120.

[5] Kales, *ibid.*, § 185, note.

held and what Gray's Cases teach us to expect that it will hold or may have held, he will be ready with becoming humility to collect the Illinois cases *en masse* on the subject of future interests and classify them under each of the chapters and sub-sections of the fifth and part of the sixth volume of Gray's Cases, so as to show what propositions learned from those cases have become the law of this state by actual incorporation, and what, on the other hand, have yet to be expressly adopted.

The student will find approximately six hundred Illinois cases on the subjects of conditional and future interests, and illegal conditions and restraints as developed in Gray's Cases. Practically all of these six hundred cases are from the Supreme Court reports. A classification and arrangement of them according to the chapters and sub-sections of Gray's Cases will reveal quite a surprising amount of material. I venture to assert that at least two-thirds of all the points developed by this portion of Gray's Cases can be reproduced in the Illinois cases. Many topics can be duplicated almost entire. This is especially true of the subject of vested and contingent remainders and the Rule in Shelley's Case; that part of the subject of cross-limitations which Mr. Gray was accustomed to cover when I took his course; gifts over on failure of issue; vesting of legacies; determination of classes; and the Rule against Perpetuities, excepting the section on powers. We shall find also that many cases which Mr. Gray gives can be duplicated by Illinois cases. The doctrine of Dumpor's Case[1] is indicated and an important practical qualification of it announced in Kew *v.* Trainor.[2] The Rule of Hayden *v.* Stoughton,[3] that a right of entry for condition broken is transferable by devise, is applied in Gray *v.* Chicago, Mil. & St. Paul Ry. Co.[4] On the distinction between vested and contingent remainders, Haward *v.* Peavey[5] could be substituted for Blanchard *v.* Blanchard,[6] and Harvard College *v.* Balch[7] for Doe *v.* Martin.[8] Practically all of the points on the Rule in Shelley's Case, including the problem presented in Perrin *v.* Blake,[9] which

[1] 4 Co. 119*b*, 5 Gray, Cas. on Prop., 23.
[2] 150 Ill. 120.
[3] 5 Pick. (Mass.) 528, 5 Gray, Cas. on Prop., 10.
[4] 189 Ill. 400.
[5] 128 Ill. 430.
[6] 1 Allen (Mass.) 223, 5 Gray, Cas. on Prop., 225.
[7] 171 Ill. 275.
[8] 4 T. R. 39, 5 Gray, Cas. on Prop., 62.
[9] 1 W. Bl. 672, 5 Gray, Cas. on Prop., 98.

are illustrated in Gray's Cases, are to be found in the Illinois cases.[1] The validity of springing future interests created by deed is fully established in Illinois.[2] The problem of Hughes *v.* Ellis[3] is raised in Mills *v.* Newberry.[4] The Illinois cases illustrate two fundamental and important principles with reference to future interests in personal property which are brought out in Gray's Cases, *i. e.*, that future interests in personal property can be created by deed or will, or even by a mere contract sufficient to pass title;[5] also that upon the gift of a chattel for life with no further limitation, there is a reversionary interest in the settlor or the testator's executor.[6]

Practically all of the rules of construction indicated by such cases as Mr. Gray was accustomed to assign for the consideration of the class when I took his course, are brought out in the Illinois cases, *i. e.*, the rule as to when cross-remainders will be implied;[7] when "survivor" will be construed "other";[8] the necessity of express words to enable shares accrued by survivorship to pass to survivors;[9] the meaning of "die without issue," including the construction of the phrase "die without *leaving* issue";[10] the construction of the limitations where the gift is in case either one of two persons die without issue, then to the *survivor;*[11] the important rules concerning the vesting of legacies, including the effect of an express direction as to vesting;[12] the force of the phrase "*to be paid* at twenty-one";[13] the force of the phrase "to A at twenty-one,"[14] a qualification of the general rule as to vesting when the postponement is for the convenience of the estate;[15] the effect of the pay-

[1] Kales, Future Interests in Illinois, §§ 127–135.

[2] Shackelton *v.* Sebree, 86 Ill. 616.

[3] 20 Beav. 193, 5 Gray, Cas. on Prop., 210.

[4] 112 Ill. 123.

[5] McCall *v.* Lee, 120 Ill. 261.

[6] Boyd *v.* Strahan, 36 Ill. 355.

[7] Lombard *v.* Witbeck, 173 Ill. 396, 409–411.

[8] Lombard *v.* Witbeck, 173 Ill. 396; Duryea *v.* Daryea, 85 Ill. 41.

[9] Lombard *v.* Witbeck, 173 Ill. 396, 409–411.

[10] Smith *v.* Kimbell, 153 Ill. 368; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Metzen *v.* Schopp, 202 Ill. 275.

[11] Summers *v.* Smith, 127 Ill. 645; Arnold *v.* Arnold, 173 Ill. 229; Hinrichsen *v.* Hinrichsen, 172 Ill. 462; Waldo *v.* Cummings, 45 Ill. 421; Johnson *v.* Johnson, 98 Ill. 564.

[12] Chapman *v.* Cheney, 191 Ill. 574.

[13] Ruffin *v.* Farmer, 72 Ill. 615.

[14] Powers *v.* Egelhoff, 56 Ill. App. 606; Howe *v.* Hodge, 152 Ill. 252, 255–277.

[15] Schofield *v.* Olcott, 120 Ill. 362; Hawkins *v.* Bohling, 168 Ill. 214; Ducker *v.* Burnham, 146 Ill. 9–24; Knight *v.* Pottgieser, 176 Ill. 368; Dee *v.* Dee, 212 Ill. 338, 352–354.

ment of income on vesting;[1] the effect of a gift over as furnishing an argument for the vesting of the prior gift;[2] and the rules as to the determination of classes, including the problem of Viner *v.* Francis,[3] which is precisely reproduced in Lancaster *v.* Lancaster;[4] the probable meaning of "youngest" when the gift is to the children of A when the youngest reaches twenty-one;[5] and especially the rules concerning the meaning of "heirs" where the gift is to A for life or in fee, with a gift over to the testator's heirs at law.[6] The subjects of the survival of powers,[7] what words exercise a power,[8] and appointed property as assets,[9] as these subjects were covered by the assignment of cases when I took Mr. Gray's course, are well brought out in the Illinois cases. On the subject of the Rule against Perpetuities, Bauer *v.* Lumaghi Coal Co.[10] might be substituted for London & S. W. Ry. *v.* Gomm,[11] Wakefield *v.* Van Tassel[12] for Dunn *v.* Flood[13] (holding *contra* to Dunn *v.* Flood that a right of entry for condition broken is not subject to the Rule against Perpetuities), Bigelow *v.* Cady[14] for Slade *v.* Patten,[15] and How *v.* Hodge[16] for Leake *v.* Robinson.[17] Where there is a gift to A for life with power in A to transfer the whole interest by deed or will, it is established by an excessive number of Illinois cases that a gift over in default of alienation by deed or will is valid.[18] The whole subject of the validity of shifting gifts over upon alienation by deed alone of the first taker or upon alienation by will alone of the first taker,[19]

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[1] Howe *v.* Hodge, 152 Ill. 252; Lunt *v.* Lunt, 108 Ill. 307.

[2] Illinois, etc., Co. *v.* Bonner, 75 Ill. 315; Ridgeway *v.* Underwood, 67 Ill. 419; Lunt *v.* Lunt, 108 Ill. 307; Eldred *v.* Meek, 183 Ill. 26.

[3] 2 Cox Ch. 190, 5 Gray, Cas. on Prop., 307.

[4] 187 Ill. 540.

[5] Handberry *v.* Doolittle, 38 Ill. 202; McCartney *v.* Osburn, 118 Ill. 403.

[6] Kellet *v.* Shepard, 139 Ill. 443; Johnson *v.* Askey, 190 Ill. 58; Burton *v.* Gagnon, 180 Ill. 345.

[7] Kales, Future Interests in Illinois, §§ 237–242.

[8] Kales, *ibid.*, §§ 245–246; Harvard College *v.* Balch, 171 Ill. 275, 285; Funk *v.* Eggleston, 92 Ill. 515; Goff *v.* Pensenhafer, 190 Ill. 200; Foster *v.* Grey, 96 Ill. App. 38.

[9] Gilman *v.* Bell, 99 Ill. 144.

[10] 209 Ill. 316.

[11] 20 Ch. D. 562, 5 Gray, Cas. on Prop., 579.

[12] 202 Ill. 41.

[13] 25 Ch. D. 629, 5 Gray, Cas. on Prop., 593.

[14] 171 Ill. 229.

[15] 68 Me. 380, 5 Gray, Cas. on Prop., 615.

[16] 152 Ill. 252.

[17] 2 Meriv. 363, 5 Gray, Cas. on Prop., 622.

[18] Kales, Future Interests in Illinois, § 168*a*, note.

[19] Stewart *v.* Stewart, 186 Ill. 60.

or upon alienation by deed or will (*i. e.*, upon intestacy) of the first taker,[1] or upon the death of the first taker without issue and intestate,[2] is quite as fully dealt with in the Illinois cases as in the English cases which Mr. Gray has given us. I might add that this line of Illinois cases is, apart from any connection with the local law, much more interesting than similar cases which have arisen in England. As showing that a restraint upon the alienation of a fee, either absolutely or for a particular time, is void, Illinois has several cases.[3] Lunt *v.* Lunt[4] fairly takes the place of Claflin *v.* Claflin.[5]

Several nice problems that Mr. Gray apparently could find no case to illustrate when he published his Cases, are to be found solved by decisions of the Illinois Supreme Court. Thus, if the limitations are to A for life with a gift over to the testator's heirs at law, and A is the sole heir of the testator at the time of his death, A will not take the remainder.[6] So, if the interests be to A in fee, but if A dies without leaving issue, then to the testator's heirs at law, and A is one of several heirs at law of the testator, "heirs" means heirs at law of the testator at his death.[7] In Madison *v.* Larmon[8] we have perhaps the only instance on record of the court taking the view that where a contingent remainder is fully destructible according to the rule of the common law, the Rule against Perpetuities applies to it. In Pitzel *v.* Schneider[9] there is actually held the rather startling proposition which Mr. Gray announces in the second edition of his Rule against Perpetuities,[10] but for which he was then unable to give any authority, that a gift to a class vesting in a single member of the class at the testator's death, may nevertheless be wholly void for remoteness, if as a matter of fact the maximum size of the share of each member of the class may not be determined until too remote a time.

Do not think that because the results of such a classification and arrangement of the Illinois cases may be in part thus easily and simply stated, the process of making it is easy and simple. The

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[1] Wolfer *v.* Hemmer, 144 Ill. 554; Kron *v.* Kron, 195 Ill. 181; and many other cases. See Kales, Future Interests in Illinois, § 169.

[2] Friedman *v.* Steiner, 107 Ill. 125; Burton *v.* Gagnon, 180 Ill. 345; Koeffler *v.* Koeffler, 185 Ill. 261; Orr *v.* Yates, 209 Ill. 222.

[3] Jones *v.* Port Huron Engine Co., 171 Ill. 502; Bowen *v.* John, 201 Ill. 292, 296; Smith *v.* Kenny, 89 Ill. App. 293.

[4] 108 Ill. 307.

[5] 149 Mass. 19, 6 Gray, Cas. on Prop., 141.

[6] Johnson *v.* Askey, 190 Ill. 58.

[7] Burton *v.* Gagnon, 180 Ill. 345.

[8] 170 Ill. 65.

[9] 216 Ill. 87.

[10] § 205 *a*.

collection of the list of cases is of itself a difficult and tedious task, requiring at least a search of the index-digest of each volume of reports under many different topics. The reading of six hundred cases is also a considerable task. The reading of many and the continued consideration of many to determine just what they decide or how they are to be supported, or on what ground they are to be condemned or doubted — often requiring much further investigation at large — is a great time consumer. Elucidating entirely new topics often proves difficult. In my opinion — and upon this point I am sorry to say that I can offer only an opinion supported by the facts which I have detailed and the reader's experience — this work is not possible for a man who goes into a busy office on a salary, with the prospect of a managing clerkship in a few years. It is not simply a difficult thing to do. He can't do it. If he is fortunate enough to be able to command his own time and devote one-half of it to this work, I think he might check up the Illinois cases on the subjects of conditional and future interests and illegal conditions and restraints in two years. It has actually taken one of Mr. Gray's pupils three years to do the work and to incorporate it in a book of four hundred pages of text. This required him to devote at least one-half of his whole time to the work, although he had the advantage of teaching a class upon those subjects at the same time. If this experience and experiment are worth anything, I have no hesitation in declaring that it is high time we ceased pretending that the mastery of Gray's Cases on the subjects of future interests is a quick asset in Illinois.

There is a strong probability that what is true respecting the gap between Gray's Cases on future interests and the Illinois law is equally true of the gap between Gray's Cases on the other subjects dealt with and the actual state of the Illinois law. My opinion on this point is based on a personal collection and arrangement of the Illinois cases relating to all the subjects of Gray's fourth volume of cases and of the subjects of the statute of limitations and prescription in the third volume. On the latter subject, for instance, there were no less than 375 cases in Illinois. Most of these arose in respect to three special seven-year statutes of limitations. They presented some extremely interesting and puzzling questions. The subject of dedication in the third volume one of my students looked up fully under my direction a few years ago. He found 164 Illinois cases. They illustrated every phase of the subject, statutory and otherwise. I doubt very much if a man

giving one-half of his whole time to the work could check up the Illinois cases covering the subjects of all of Gray's Cases in less than ten or twelve years. Practically, I don't think it ever will be done by any one in practice in the ordinary sense. What person who has any "practice," as that term is ordinarily used, can devote to such work one-half of his time, or even less, for the first ten or twelve years from the time of his graduation?

I believe that the subjection of the case-books in some of the courses other than those on Property to an experiment and test similar to that I have applied to Mr. Gray's case-books would establish the same defect in the Harvard Law School case-books as a whole as that which exists in Gray's Cases. I do not believe it possible that the gap between the case-books on Evidence, Torts, Agency, Contracts, Trusts, Corporations, Equity Jurisdiction, Bills and Notes, and Criminal Law, and the present state of the Illinois law on those subjects is any less than that between Gray's Cases and the Illinois law. In fact, whenever I have had occasion to prepare an argument on any point of law dealt with at any length in any of the Harvard Law School case-books, I have found the whole subject fully dealt with and often settled for good or ill in the Illinois cases. I recall the following four striking instances where this was true: where the question was one of the right of a person not a party to a contract to sue upon it;[1] where the problem was under what circumstances a master owes a duty to the servant to use due care; where the question was as to the duty of a landowner to trespassers, licensees, and invited persons, including also the doctrine of allurements to children; and where the question was as to the sufficiency of the defense of right to possession where the one entitled to possession of land enters thereon, using no more force than is necessary.[2] If one-half of one's time for ten or twelve years is not too much in which to check up Gray's six volumes of Cases on Property, one might easily assign as much time again to the same treatment of the Illinois cases dealing with the subject-matter of the other case-books studied in law schools using the Harvard Law School case-books.

Finally, I believe that what is true here in Illinois is equally true in such states as New York, Pennsylvania, Massachusetts, Missouri, and Ohio, and very likely also in Wisconsin, California, Alabama, Georgia, Iowa, and Connecticut. In short, in the older, larger, and

[1] Liability of Water Companies for Fire Losses, 3 Mich. L. Rev. 508–511.

[2] Kales, Future Interests in Illinois, §§ 46–59.

more important jurisdictions we are facing a condition where the Harvard Law School case-book no longer turns out its graduates well equipped for actual practice at the bar. Nor is the Harvard Law School case-book graduate who has mastered his subjects able, in any reasonable time or under any average or usual conditions, to check up the results derived from his case-books with the law of the particular jurisdiction where he may practice.

If the Harvard Law School case-book is open today to the objections which I have voiced, then the strength of those objections is increasing every day, for the conditions which make them serious are growing with incredible swiftness. In the 1870's, for instance, the defect to which I have called attention may have been almost wholly non-existent. The comparative fewness of volumes of reports in different jurisdictions of the United States necessarily meant that the law of no one single jurisdiction came near being complete in itself. Almost everywhere the process going on was the express incorporation of rules of law by reference constantly to the English cases and cases from other jurisdictions. There was at that time, perhaps more nearly than at any time since, what may have been called a body of American law, *i. e.*, rules of the common law which all the states together adopted, and all alike were apt to follow, but which no one state had wholly applied in the reported cases. Those conditions dictated the present character of the Harvard Law School case-book. That they have gone by for many states needs no demonstration.[1] That they are rapidly disappearing for other states every decade will testify. With the passing of these conditions must pass the Harvard Law School case-book in its present form.

The probable length of time and the amount of labor required by the Harvard Law School case-book graduate to put himself in touch with the local law of one of the selected jurisdictions in the subjects touched upon in the case-books is of course a complete answer to the position which I have heard assumed in favor of the

[1] " Fifty years ago thirty-six per cent of the cases cited by the Court of Appeals of New York were from other jurisdictions, and twenty-two per cent were English. To-day but seventeen per cent are from without New York, and over one-third of these have to do with constitutional law and bankruptcy (the greater number being federal decisions). A like showing may be made for any jurisdiction. One court has said recently (Phœnix Ins. Co. *v.* Zlotcky, 66 Neb. 584) : ' Every court in the course of time develops peculiar doctrines with respect to which it differs from others of co-ordinate jurisdiction. Where these peculiar doctrines work no harm, certainty and consistency are no less important than agreement with other courts.' " (Professor Roscoe Pound in 2 Ill. L. Rev. 186.)

present case-book, — that it simply gives a foundation of general principles, leaving it to the student in practice to ascertain the local law. Of what use is a pretentious foundation of principles if the opportunity to make it professionally and commercially available in connection with the local law is denied the student? It is a pretty sad valedictory to the student graduating to say: "We have given you a splendid foundation, but it is commercially and professionally of little account except as you by your own efforts compile each of fifteen case-books from the decisions contained in from three hundred to five hundred volumes of reports of the jurisdiction where you practice. Eight men of unusual talent and industry working together under favorable circumstances, in a space of ten or fifteen years, have been able to put out thirty volumes of such cases, or an average of four volumes each, so that the task before you is probably impossible if you have anything else to do. But you must struggle with this difficulty as best you can. We cannot change because the case-books have been made after the present plan; the present majority approves them, and that ends the matter for us."

What, then, shall be done?

The proposal now made is that the subject-matter of the case-book be so altered that it shall present a true picture of the present state of the law in a particular jurisdiction — for example, Illinois, — with the same fidelity that it now gives us a correct understanding of the law of England prior to modern statutory changes, or of the law of that ideal jurisdiction which the compiler of the present Harvard Law School case-book has made for himself.

Let me hasten to say that this proposed change does not mean that the cases which indicate the historical development of English law are to be omitted, or that the great English cases which are the historical landmarks of the law are to be dispensed with. These we have in common with all jurisdictions where the law is based upon the common law. I mean only that the case-books shall be revised along some such lines as these: after retaining the historical and introductory matter of the different topics, there shall follow the cases which show what the English law was, with this difference, however, — if there are Illinois cases which have incorporated the rule of the English law and made it part of the Illinois law, let us have the Illinois case for specific and minute study. Let the English cases and cases from other jurisdictions be put into a footnote. If the Illinois cases depart from the well-

known rule of the English cases, as they do for instance in regard to the alienability of contingent remainders, we should have, perhaps, after the insertion of an English case, the Illinois cases departing from it. In short, the aim should be to insert into the case-book for minute study by the student and the teacher all the decisive cases for or against the incorporation of the principles of the English law.

No doubt, in carrying out this aim of giving the student a correct understanding of the origin and present status of the rules of law in Illinois, some topics — as, for instance, the construction of Section 10 of the Statute of Frauds — may be entirely omitted because Illinois has no such statute. On the other hand, I am not sure that some old subjects might not be resurrected. I notice, for instance, that in the second edition of Gray's Cases on Property, Volume I., the subject of attornment, as treated in the modern cases, is entirely neglected. In Illinois this topic might very properly be restored because of the existence of at least two stimulating and instructive cases.[1] No doubt some new topics will be found which were no part of the English law — as, for instance, the statutory estates in place of an estate tail. Such topics can usually be dealt with fully in the Illinois cases alone. Many special Illinois statutes must be inserted for study — as, for instance, the seven-year statutes of limitation. When the Illinois statute follows a well-known English act — as, for instance, the Statute of Frauds relating to the making and revocation of wills — the Illinois statute and the decisions under it will be inserted for minute study. As for decisions from other jurisdictions, it is not at all inconsistent with the proposed change that they be inserted. They are of course appropriate where they fill out an untouched point. Where they reveal a different rule from that which appears to be in force in Illinois, they would probably more naturally appear in a footnote.

At all events, you are bound to have a case-book. Whether or not it is sufficiently unlike the present case-books in subject-matter to make it worth the trouble of reconstructing will depend upon the number of reported cases in the particular jurisdiction. The case-book in its present form might well be regarded as in the most excellent form possible to indicate the probable state of the law in North Dakota, which has only 14 volumes of reports. If, however, a case-book be constructed for the purpose of presenting the pre-

[1] Fisher *v.* Deering, 60 Ill. 114; Barnes *v.* No. Trust Co., 169 Ill. 112.

cise state of the law in New York, where they have upwards of 800 volumes of reported cases, and where, as is well known, the departures from the common law are legion, or of Pennsylvania with about 422 volumes of reports, or of Illinois with its 350 volumes of reported cases, it can hardly be doubted that its exact subject-matter will be very different from that of the present Harvard Law School case-book.

In presenting the general principle of these proposed changes it is unnecessary to be more specific as to its application. Every one who has tried to construct a case-book must know what nice matters of judgment are involved in determining what to leave out and what to put in. These same difficulties would confront the reviser of the present case-books on the lines suggested. Two of us, therefore, with precisely the same aim, might differ in the details of carrying it out. We might arrive at different conclusions as to just the proper proportion of Illinois cases which should go into the text, and when it was better to put a case on the same point from some other jurisdiction in the text and the Illinois case in the note. My own inclination would be to go very far in inserting the Illinois case in the text. If an English case, while not a great landmark in the law, was well reasoned, and the Illinois opinion very badly reasoned,[1] I should be inclined to put in the Illinois case so that the opinion of the Illinois court could be directly subjected to criticism and the criticism be known and appreciated by class after class of students. Such a step, while not to be laid down dogmatically for all cases, is the logical application of the fundamental purpose of the change proposed, *viz.*, to throw into high relief the actual language and decisions of our own court for analysis and criticism, so that the state of the law in the given jurisdiction may be most accurately known and understood in the terms of its own decisions. Cases from England and other states may be used because they are the best reasoned and show what the Illinois law

[1] A good example of this occurs in regard to the case of Dean *v.* Walker, 107 Ill. 540. From the Illinois cases a fairly complete exposition of the right of a third person to sue upon a contract to which he is not a party could be made up. They establish the doctrine of Lawrence *v.* Fox (20 N. Y. 268), but they seem to deny the sole beneficiary theory. (See 3 Mich. L. Rev. 508–511.) Dean *v.* Walker held, however, that if A, a mortgagor, assigned to B, who does not assume to pay the mortgage, and B assigns to C, who does assume to pay the mortgage, then the mortgagee can sue C. The result is reached without any reasoning at all. Would you insert this case in the text or would you put in one of the New York cases the other way, or a case from some other state in accord with Dean *v.* Walker, but with some attempt at reasoning.

is, or ought to be, but this must be done in complete subordination to the principal object of presenting a perfect picture of the then state of the local law.

I have never heard but two objections raised to the change proposed. One relates to dollars and cents, and the other to an educational ideal. The first is founded upon the fear of a loss of tuition fees; the second upon the fear of a departure from the best educational ideal. Neither objection will stand scrutiny.

There need be no fear that what I propose will be a departure from the best educational ideal. I venture to assert that the change advocated will be a step in fulfilment of a better educational ideal than now exists. It will give up no essential educational effect which is now produced, and it will add a most important educational effect which is now lacking for one practicing in one of the older and more important jurisdictions.

The great educational value of the Harvard Law School case-book which arises from analyzing cases and mastering the subject through cases, is not lost. The educational value of observing the historical development of the law and of comparing different rules in force in different jurisdictions need not be lost. The plan proposed does not contemplate the slighting of either history or comparative law, but simply that these subjects be subordinated to the principal aim of ascertaining the present state of the law of a given jurisdiction. History of the law is necessary to indicate its origin or foundation in every jurisdiction. The study of the development of the law in other jurisdictions in proper subordination is equally wise as indicating uncertainty on the point and the possibility of a bad rule in the principal jurisdiction being changed. The difference between what I propose and the present arrangement of the case-book is one of emphasis. I think it would be a fatal admission by those who disagree with me to contend that strictly professional knowledge should be subordinated to general education and culture, or to history and the study of comparative law.

The change which I propose not only will not lose any essential educational feature now possessed by the present case-book, but will produce a degree of efficiency and exact knowledge which is now denied to the student of the case-book, and which he can never attain by his own efforts. With the new case-books in full operation a graduate from the law school will not have to look up departures and changes from the system which he has learned.

He will not have to determine what is good, bad, and uncertain in the jurisdiction in which he practices. He will not have to relearn all the propositions which he recognizes as law in the terms of the decisions of a given jurisdiction and tabulate the topics and points that still remain untouched. Instead of the prospect of many years of labor in doing a small part only of such work, upon graduation he knows one system at least as well as he now knows the law of that ideal jurisdiction where the only reports are the Harvard Law School case-books, and the only court is the body of men who instruct the class from them. He has the benefit of the labor of others which he could not possibly duplicate in a lifetime. The scholar who has mastered the common law and the men who have become specialists in certain branches of the law of a given jurisdiction contribute the selected materials for his education. He will come before the courts of his state with somewhat the same grasp of his subjects that one of the late Professor Thayer's pupils might have had who appeared before the United States Supreme Court in a case involving the Commerce Clause. Who would not exchange such an equipment for practice in New York, obtained under the guidance of such men as now constitute the faculty of any first-class law school using the Harvard Law School case-books, for that which is now offered by these same faculties? What recent case-book graduate would not exchange his present incapacity in the courts of the jurisdiction where he begins practicing, for an efficiency approximating that which he would have if upon graduation he began to practice before a court, the divisions of which were presided over by his teachers, and where the reports of authority were the case-books he had studied?

It is true that such a change as that proposed once taken openly will alienate from a school all men who expect to practice in any other jurisdiction than the one where the school is situated. But if I am correct in saying that the change suggested will produce greater efficiency, which will be not merely temporary, but permanent — if it will furnish a training which the present Harvard Law School case-book graduate cannot duplicate — such a school will at once attract every man studying for practice at the bar in that state. In the older and more important jurisdictions this holds out an opportunity for an enrolment of students which ought to satisfy any school. In New York, for instance, during the last four years an average of 986 new candidates for admission to the bar have presented themselves each year. In Pennsylvania the average

number of new applications in the same period has been 124; in Illinois, 253; in Massachusetts, 288; in Ohio, 195.[1] Furthermore, in all these jurisdictions there are law schools in excellent standing where already a very large percentage of students expect to practice in the state where the school is situated. In Columbia I am informed that about 60 per cent of the graduating classes expect to practice in New York;[2] at Cornell, out of a graduating class of 47, 40 or 87 per cent expect to practice in New York; at the University of Pennsylvania, with a graduating class of 61 in 1906, only 3, or 5 per cent, are now practicing outside of the State of Pennsylvania, the rest are members of the Pennsylvania bar, and this, I am informed, represents a fair average in recent years; at the law school of the University of Illinois 80 per cent expect to practice in Illinois; at Northwestern University Law School 75 per cent; at the Boston University Law School 85 per cent of those graduating in June, 1907, expect to practice in Massachusetts; at the Cincinnati Law School 90 per cent of the students expect to practice in Ohio; at the law department of the University of Missouri 95 per cent of the whole enrolment expect to practice in Missouri. I would confidently predict that a school in New York, Pennsylvania, Illinois, Massachusetts, Ohio, or Missouri, taking the stand which I describe and carrying it out, would lose in no instance more than 20 per cent of its present number of students, and in some instances as few as 5 per cent, and would attract a very considerably larger number than it lost. I should confidently expect

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[1] The State Board of Bar Examiners for New York wrote me on October 10, 1907, that: "Since April, 1902, to date, there have been 5425 *new* applications filed for admission to the bar to the State Board of Bar Examiners in this state. That does not take into consideration those admitted on motion." I was able to obtain from the Board of Bar Examiners in the several states of Pennsylvania, Illinois, Massachusetts, and Ohio, the average total number of candidates applying each year for the last four years. These figures are as follows: Pennsylvania, 206; Illinois, 422; Massachusetts, 480; Ohio, 325. In only one instance did I receive even an estimate of what proportion of these totals represented new candidates, excluding those who had taken the bar examination before and failed. The Chairman of the Massachusetts Board of Bar Examiners estimated that three-fifths of the total number of applicants each year were new candidates. Using that as a basis for calculation, I have in each of the states mentioned taken three-fifths of the total average number of candidates each year as representing an approximate number of new candidates. Considering the reputed high standard of the Massachusetts Bar examinations, I believe that the allowance of three-fifths of the total number of candidates applying as representing the new candidates is probably considerably below the actual facts.

[2] This is Professor Kirchwey's figure. He says that 20 per cent more acquire a temporary residence for the purpose of taking the New York bar examinations.

it ultimately to obtain a very large percentage of the total average number of persons applying for admission to the bar in the particular jurisdiction where it was situated.

In drawing this paper to a close let me briefly call attention to two general considerations in support of the proposals which I have made.

In the first place, the very reasoning which originally supported the Harvard Law School case-book against the text-book now requires the change in that case-book which I advocate. One of the two essential ideas of Professor Langdell seems to have been that the law was to be studied by going to the original sources. President Eliot, in speaking of Professor Langdell, said:

"He told me that law was a science. I was quite prepared to believe it. He told me that the way to study a science was to go *to the original sources*. I knew that was true. . . . "

Professor Wambaugh speaks more fully of this idea:[1]

"He [Langdell] knew — as, indeed, every law student learns in the first week of his studies — that the existence and limits of a rule of law must be proved finally, not by a text-book, but by the reported decisions of courts. He knew that when a lawyer has occasion to test a rule of law he searches for those decisions. Professor Langdell determined that the student should be trained to use those *original authorities*. . . . "

I do not really know precisely what ought to have been considered *the* law when Langdell compiled his first case-book, or what were the original sources of that law, but I do know that today, in the older and more important jurisdictions, *the* law is the body of rules which are enforced in that jurisdiction, and the original sources of that law are not to be found in the English reports, or in the reports of other states, or even in the mixture which the present Harvard Law School case-book contains. They are to be found in the reports of the given jurisdiction just as truly and just as clearly as the sources of what Professor Langdell in 1871 called the common law were to be found for the most part in the English cases. The reports in each of such jurisdictions have become the principal, and for a very large body of rules the only, original sources of the law of that jurisdiction. Why, then, should not the student who expects to practice in such a jurisdiction be trained to use those original authorities and to derive from them by crit-

[1] Professor Langdell — A View of His Career, 20 HARV. L. REV. 2.

icism and comparison the general propositions of law there in force?

Secondly, the need of a development and perfection of our local law similar to that which the local law of England has enjoyed, furnishes an argument in favor of the change which I have suggested.

There is no necessity in these days of American idolatry of the common law to dwell upon the development and perfection to which the local common law of England has been brought. Rather do we need to observe the means by which this acknowledged superiority was accomplished. It is not too much to say that without the most exaggerated attention to the common law as a local and insular system, apart from, if not actually opposed to, the systems of law developed on the Continent, it would never have reached the development and perfection which has made it the foundation of the law of the English-speaking world. If we may trust Professor Maitland, it was to this attention to the barbarisms of local and insular customs that it owes its existence as a unique and worthy system of law.[1] In the middle of the sixteenth century the life of the ancient common law was by no means lusty. It was menaced by the introduction of the academically taught Roman law of the Continent. Such a reception was prevented, and the common law triumphed at a critical moment of its history, because it had been reduced to writing in the Year Books, because it was mastered, taught, and practiced by the members of the Inns of Court, and because out of the body of those who knew and administered it there sprang such teachers and writers as Littleton, Fortescue, Robert Rede, Thomas More, Edward Coke, and Francis Bacon. The triumph of the common law once assured, its perfection as a system it undoubtedly owed to the fact that through generations it had been slowly wrought out by an unbroken and highly organized body of specialists who continually brought to the solution of legal problems — either in argument at the bar or in judgments from the bench — a very high degree of expertness and learning respecting a local and insular system in actual force and operation. To such a degree has the organization of the bar in England now been carried that not only is the business of the taking care of clients entirely separated from the profession of handling litigation, but each has its subdivisions. The profession of hand-

[1] English Law and the Renaissance, reprinted in 1 Select Essays in Anglo-American Legal History, 168–207.

ling litigation is divided into the law and chancery bars, and it is the practice of all but the leaders to devote themselves to the work in a particular court before a particular judge.[1] When the English text-books, ancient and modern, which are revered and applauded as the work of masters of the common law are observed, it is found that they consider with laborious minuteness, sometimes on narrow special topics, only the decisions of the local jurisdiction, criticizing what is bad or doubtful, and bringing to a coherent whole that which is consistent and harmonious with the premises upon which the local system is based. Of course, the Englishman who studied for the bar always devoted himself primarily to the mastery of the local law. Formerly no doubt this was accomplished by the reading of text-books and the consideration of cases to be found in the English reports. Now, however, that the teaching of law by case-books has been accepted to some extent in England we find the case books in use composed practically wholly of English cases, — cases which purport to give to the student a picture of the presently existing state of the English local law. In short, in England for centuries, students, lawyers, teachers, text-book writers and judges, and even social philosophers have united in the bringing of a single system of law administered by the courts of a single central jurisdiction to perfection. No wonder a great result has been achieved.

Is the local law of our American jurisdictions to be denied the development and perfection which must come from an attention to it similar to that which the English local law has received for centuries? The life of the local law in the various states of the Union is strong and vigorous for the same reasons that the common law triumphed over the Roman law in the sixteenth century. It is to be found in the printed reports of the local supreme and appellate courts. A body of local lawyers and judges adheres to what the courts of the particular jurisdiction declare to be the rule. The local law is pushing out the academically taught common law, even as the common law under its masters, from Littleton to Coke and Bacon, prevented the reception of the academically taught Roman law. It cannot be said, however, that the local law is being brought to perfection. In fact, the signs are ominous of a lack of intelligent and healthy development. We find our supreme courts and lawyers apparently unable to know and follow the decisions of their par-

[1] A Philadelphia Lawyer in the London Courts, Part I, by Thomas Leaming, 18 Green Bag 444.

ticular jurisdictions.[1] The duplication of decisions upon points of law already fully settled and in many instances elementary, is inordinate.[2] We see in consequence a resort to hasty and immature codes as a relief from uncertainty and the entanglements of a system but ill digested. The bringing of the law in the older and more important states to any perfection at all approaching that which the common law has attained, requires the same concentration upon its outline and development as that which served to develop and perfect the common law. The details of our local system must be studied as we have in the past studied the common law. We have inherited a great system of law, but it will give place to such false gods as the ill-advised code, or go the way of the spendthrift's inheritance, unless it receives, in each place where it has taken root, most minute and painstaking cultivation. For this development of the local law we need teachers who have mastered it, who know it with all its inconsistencies, all its barbarisms and back-slidings, and who can view it in the light of its historical

[1] The recent case of Ortmeyer *v.* Elcock, 225 Ill. 342, 2 Ill. L. Rev. 45, is a striking example of this. There the court construed a remainder after a life estate to A or his heirs, as giving A an indefeasible fee simple, disregarding Ebey *v.* Adams, 135 Ill. 80, an excellent case to the contrary. So Kohtz *v.* Eldred, 208 Ill. 60, holding that "die without issue" means die without issue in the lifetime of the testator and that only, runs *contra* to Thomas *v.* Miller, 161 Ill. 60; Smith *v.* Kimbell, 153 Ill. 368, 377, 378; Summers *v.* Smith, 127 Ill. 645, 649. Among the Illinois cases the number of examples of this sort could be very greatly increased without much trouble. (See Hood *v.* Thorp, 228 Ill. 244.) Professor Wigmore has furnished me at a moment's notice with the following examples that have recently come to his attention: 1906, Earley *v.* Winn, 109 N. W. 633 (Wis.), (slander; the ruling is apparently inconsistent with Talmadge *v.* Baker, 1868, 22 Wis. 625, which is not cited.) 1900, People *v.* Casey, 124 Mich. 279, 82 N. W. 883 (on a point which had been settled by at least twelve Michigan cases between 1864 and 1900, the court cites four of these and eleven from other states). 1906, Dielman *v.* McDanel, 78 N. E. 591 (Ill.) (hereditary insanity; the court cites rulings from other jurisdictions but ignores the following three from its own records: 1862, Snow *v.* Benton, 28 Ill. 306; 1874, Meeker *v.* Meeker, 75 Ill. 260, 270; 1883, Upstone *v.* People, 109 Ill. 169). 1905, Shockley *v.* Tucker, 127 Ia. 456, 103 N. W. 360 (negligence of a physician; Lacy *v.* Kossuth Co., 1898, 106 Ia. 16, 75 N. W. 689, was not cited, though involving the same question). 1906, Murray *v.* Dickens, 42 So. 1031 (Ala.), (account-books; the opinion cites an encyclopedia, and ignores the recent contrary case of Snow, etc, Co. *v.* Loveman, 131 Ala. 221). 1903, Dovey *v.* Lam, 117 Ky. 19, 77 S. W. 383 (testimony of a co-defendant's wife; cases cited from Idaho and Indiana, but the two preceding ones in this state ignored).

[2] The best example of this that I recall in the Illinois cases is the way the doctrine of Lawrence *v.* Fox, 20 N. Y. 268, has been again and again upheld. The objection that the third party could not sue upon the contract goes to the propriety of the plaintiff's suit and is not one which arises merely incidentally. Yet we have in Illinois at least thirty-two reported cases applying the rule of that case. See 3 Mich. L. Rev. 510, n. 73.

antecedents and the contemporary development of comparative systems. In view of the lack of organization in our bar, I believe that the perfection of the knowledge of the local law lies in the hands of our law schools. To their faculties must be entrusted the work of preparing the new case-books which will link us to the past, keep us in touch with what is best about us, and yet bring a great white light to bear upon the system of law developed in the given jurisdiction. To them will fall the lot of producing a local bar as expert in the law of the given jurisdiction in the subjects taught as the present Harvard Law School case-book student is in the law of that ideal jurisdiction where the Harvard Law School case-books are the only authorities and his instructors are the only judges.

In conclusion let me remind you that it is almost axiomatic in our present-day creed of life and thought that the current truths are by no means immutable. In fact, paradoxical as it may seem, the "truth" that we most universally acquiesce in just now is that there is no such thing as finality. There is nothing so sure as change. As Ibsen picturesquely put it: "Truths are by no means the wiry methuselahs some people think them. A normally constituted truth lives — let us say — as a rule, seventeen or eighteen years; at the outside twenty; seldom longer. And truths so stricken in years are always shockingly thin." Nothing within the range of my knowledge more strikingly illustrates this generalization than the history of public opinion as it has found expression in English legislation of the nineteenth century. As Professor Dicey tells us, we have first the period of "Old Toryism" led by Lord Eldon. This came to an end as a predominant force in the 1830's. Then "Benthamite Individualism" gained the ascendancy till the 70's. That in turn has given way to the "collectivist" or "socialistic" movement of the latter part of the century. In precisely the same way we may premise that the text-book system of teaching law has gone by forever. It still lingers where the light has failed to penetrate. Perhaps some survivor of its golden age, who has, as had Lord Eldon after the passage of the Reform Bill of 1833 became a certainty, lived far beyond his time, still cries out for it. But it is gone. In its place has come Langdell's great innovation. Year by year it has made converts and gained prestige until, so long ago as 1890, its complete triumph has been assured. So overwhelming has been its success, so invincible its progress, that in obedience to the law of evolution and change it is not *a priori* unlikely that at the very moment of its great triumph

the beginning of its decline in its present form should make its appearance.

I shall say one word further so that there may be no misunderstanding. I have had occasion to assert that the present Harvard Law School case-book is seriously defective. In making that criticism I have not attempted to soften the force of my remarks. Rather have I done my utmost, without being intemperate or unfair, to make my criticism felt. Do not assume, however, that because I believe that the time is at hand for a radical step in the evolution of the Harvard Law School case-book, I will yield to any one in the honor in which I hold those men who developed the present method of teaching law as a science and by cases, or that I cease to recognize my personal debt and the debt of the profession at large to those men and to the law school which stands as a monument to all they have done. But I am not satisfied with doing them honor. I wish their ideas more completely to predominate with the bench and bar of the various states of the Union. I believe that the step which I suggest, undertaken by those who have been able and loyal supporters of the Harvard Law School case-books and other case-books of equal merit, will spread among lawyers and judges the influence and ideas of our masters to an extent which has hitherto been impossible and which never can be equalled so long as case-books constructed upon the present lines are used. The Harvard Law School case-books and others constructed upon similar lines already own the best law schools everywhere. In order that they may dominate the bench and bar in the same degree, I suggest that they must be revised along the lines which I propose.

Albert Martin Kales.

CHICAGO.

NOTE. — The HARVARD LAW REVIEW asks a comment on Professor Kales' article. As the article is written from a purely practical point of view, the comment also will be practical.

It ought to be enough to point out that the lawyers of this country are really not inefficient, and that all of them, whether educated with Harvard case-books or other case-books or treatises, have been trained according to the theory that American law is essentially one science and that the peculiarities of local decision are not to be emphasized for students. Nor has this view been adopted thoughtlessly. In 1803 appeared Tucker's Virginia Blackstone, and in 1831 Reed's Pennsylvania Blackstone; and these have not been the only elementary books on local law; but the books named, and all similar treatises, have long been superseded by works of a national scope. There are many local books on Pleading and Practice, and a few on topics in the substantive law; but the local

books are in the hands of practitioners and not of students. It is unquestionable that the successful practitioner must be acquainted with local law; but it is impossible to agree with Professor Kales' allegation of the inefficiency of persons who have failed — as almost all have failed — to gain this useful knowledge as part of their elementary course of study.

Further, one must be permitted to believe that Professor Kales has overestimated the departures of local courts from the doctrines generally recognized. His specifications as to Illinois doctrines on Property do not seem to require a law school, even in Illinois, to make Illinois peculiarities the basis of the regular course of instruction. Doubtless, to some persons local peculiarities seem more numerous and more serious than to others; but an examination of various treatises and case-books, and of the local law of several states named by Professor Kales as probably having important peculiarities, makes it not unreasonable to believe that as to each branch of the law the gap between Harvard and Illinois — or any other state — may be bridged, for students' purposes, by a very few pages.

Again, that gap, such as it is, seems likely to be narrowed in Illinois, as in all other jurisdictions, by the desire for uniformity and by the growing knowledge of outside decisions. Professor Kales gives in a footnote instances wherein the courts of several states, and especially of Illinois, have ignored their own former decisions and have followed the decisions of other jurisdictions. Thanks to publishers, vast encouragement is given to the desire of practical lawyers to bring to the knowledge of courts the decisions of other jurisdictions and to discuss questions in the light of general law. Indeed, Professor Kales' proofs of the scanty respect which the Illinois Supreme Court gives to its own peculiar decisions, seem to show that when a lawyer wishes to know how that court will decide in the future, — which, of course, is really the problem that the practical lawyer encounters, — his attention should not be directed to peculiar Illinois cases, but should be directed to general treatises and to general collections of cases.

Finally, — to condense two practical considerations into one sentence, — the student really cannot predict where he will spend his professional life, and he knows that if he has appreciable success he will deal with business in all parts of the United States.

There are other practical reasons opposed to Professor Kales' suggestion that local law should be made the basis of the law school's regular work; but by this time it ought to be apparent that the real difficulty is the conflict of Professor Kales' suggestion with the history of law and with its probable future. Nor does Professor Kales' suggestion gain weight from his conception that, as all other persons concede the necessity of gaining acquaintance with local law, his plan differs in emphasis only. In his presentation of the educational value of local law he goes to such an extreme that he has no common ground, even by way of compromise, with those who hold the usual belief that, though local law should not be wholly ignored, the ordinary instruction in the law school should be based upon general law, and that the student's systematic work with local statutes and local decisions should be undertaken merely by way of a supplement upon completing each subject, or by way of a comprehensive review of the whole law just before or just after admission to the bar.

Eugene Wambaugh.